RULE 29.1 LIST

Johnson Controls, Inc. has no parent. It holds a controlling interest in the following companies which are not wholly-owned subsidiaries: Technotrim, Inc.; Trim Master, Inc.; Johnson Controls (NZ) Ltd.; Naue-JCA Verwaltungsgesellschaft mbH; Naue-JCA Objekt Bochum GmbH & Co. KG; JCI SDN BHD; E.A.U. Naue GmbH & Co. KG; Vintec Company; Yokogawa Johnson Controls Corp.; Johnson Yokogawa Corp.; Pannabco; Pannesma; Fanini F.A.I.N. SpA; Lapeer Trading Co.; IllumElex Corporation; and Seating Systems Technology, Inc.

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were, as plaintiffs-appellants, the United Automobile, Aerospace & Agricultural Implement Workers of America International Union ("UAW"); UAW Local Unions Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516 and 1719; and Lois Sweetman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney, and Donald Penney, representing the class of all past, present, and future production and maintenance employees employed in bargaining units represented by the UAW at nine plants owned by Johnson Controls, Inc.; as intervening plaintiff-appellant, Local 322, Allied Industrial Workers of America, AFL-CIO; and, as the defendant-appellee, Johnson Controls, Inc.

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COUNTERSTATEMENT OF THE CASE

Title VII embodies a "balance of rights." *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1788 (1989) (plurality opinion). In this case, gender equality in the workplace must be balanced against threats to the health and safety of unborn children from toxic manufacturing operations. This Court's review of the balance struck by Johnson Controls and approved by the courts below requires careful consideration of the factual and procedural background. Yet the UAW's brief repeatedly either misstates or ignores the nature of the industrial safety risks in question, how Johnson Controls has responded to those risks, and how the courts below evaluated the record evidence and the legal issues. The UAW also attempts to sidestep its own concessions and waivers of material issues that it now belatedly seeks to raise.

A. The Substantial Risks Of Irreversible Injuries To Unborn Children Through Maternal Exposure To Lead

The UAW conceded below that it is "clear" the record evidence establishes a "substantial risk of harm to the fetus" from lead exposure. UAW Seventh Cir. Br. 33. Now, however, it seeks to recharacterize the safety issue as simply a "theoretical risk of fetal cognitive deficit" that might cause " 'very subtle' learning problems" later in life. UAW Br. 5 n.5, 21. This recharacterization is untenable.

1. As both the District Court and the Court of Appeals found, there is overwhelming evidence that, at the levels at issue in this case, lead in a pregnant woman's body poisons the fetus's developing brain and central nervous system. Lead "transfers" from the woman's blood across the placenta to the fetal circulatory system; "[b]ecause the fetus' blood system is nourished by the mother, the unborn child possesses approximately the same blood lead level as the mother." Pet. App. 12a & n.13 (citing evidence). As described by one of the UAW's experts, once in the fetus's blood, lead in the doses at issue here causes "substantial irreversible cellular and functional

damage to the brain" and central nervous system. Silbergeld Dep., JA 240; see also Fishburn Test., JA 148-150; Chisolm Dep., JA 167 ("Lead binds to and is retained by an infant brain, that is the difference between an infant brain and an adult brain"). These effects are "irreversible" because "the brain is not capable of cellular repair." Silbergeld Dep., JA 229; see generally Pet. App. 12a-17a; JA 5-9, 15-16.[1]

The results of such damage are devastating. They have variously been characterized as including irreversible "retarded cognitive development," Chisolm Aff. ¶ 6, JA 199; permanent "intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities," Scialli Aff. ¶ 7, JA 180; "damage to the higher brain function resulting in decreased neuro-behavioral development," Whorton Aff. ¶ 8, JA 187; and a "clear decrement in the subsequent mental development of the infant," Hammond Aff. ¶ 3, JA 72. Far from "theoretical," UAW Br. 21, the risk of such injuries from the maternal blood lead levels involved in this case was established below to be "large," "substantial," and "grave."[2]

The effects of such injuries are " 'very subtle,' " UAW Br. 5 n.5, only in the sense that they "may not fully manifest themselves until the child is diagnosed as having learning

[1]Two explanations have been offered for the heightened susceptibility of the developing fetal brain to lead. First, a fetus (like a small child but unlike an adult) has not yet developed a "barrier" that would prevent lead from entering its brain directly from its blood. Fishburn Test., JA 148-151. Second, "because the immature brain is taking up calcium more rapidly than the mature brain" due to "a difference in the rate constance of the calcium transport system," there is a "more extensive uptaking of lead by the immature brain." Silbergeld Dep., JA 231.

The dangers of lead ingestion in young children have long been noted. "[T]he fetus is medically judged to be at least as sensitive, and, indeed, is probably even more sensitive to lead than the young child." Chisolm Aff. ¶ 6, JA 199; see also Scialli Aff. ¶ 5, JA 180.

[2]See, *e.g.*, Fishburn Test., JA 158; Fishburn Test. 74, attached to Jaspan Aff. (R.38); Scialli Aff. ¶ 10, JA 181; Chisolm Aff. ¶ 6, JA 199; Whorton Aff. Ex. C, JA 193-194; Hammond Aff. ¶ 3, JA 72. See also Pet. App. 12a, 20a, 32a; JA 15-16, 20.

problems in a school setting some five to six years after birth," Pet. App. 16a. At that point the child

> " 'discovers that he can't remember, that his brain cannot pay attention, what our psychologists here called deficits in auditory processing, which is a fancy way of saying they can't understand what they hear, can't process it, and use it effectively. And those things will impair a child pe.haps toward the end of the first grade, particularly in the second grade.' " Pet. App. 16a (quoting Chisolm Dep., JA 171).

2. These injuries cannot be avoided simply by waiting to remove a woman from exposure to the lead levels in issue until she decides to become pregnant. First, it would be irresponsible to ignore the fact that, in the Court of Appeals' words, frequent "unplanned or undetected pregnancies" are "one of the exigencies of life." Pet. App. 10a.[3] Second, lead is an "accumulative toxicant"—because it builds up in the blood and soft tissues and is stored in the bones, blood lead levels may take two or three times as long to decrease as they do to increase. And because the bones decalcify during pregnancy to nourish the developing fetus, "stored lead" is "transferred" to the fetal brain long after the mother's removal from lead exposure. Pet. App. 17a-19a (quoting evidence). As UAW expert Ellen Silbergeld observed, the fetus remains in danger because "[f]or all purposes there is continuing exposure to lead even after removal from sources of lead." JA 232.[4]

[3]See also Chisolm Aff. ¶ 9, JA 200; Scialli Aff. ¶ 11, JA 181-182. The fetus may suffer severe harm between the time of conception and the time pregnancy is detected. Moreover, it is believed that lead is stored in the placenta " 'during the early stages of pregnancy to be released [later] when the placenta becomes functional.' " Pet. App. 19a & n.24 (citations omitted); see also Fishburn Test., JA 161; Fishburn Test. 22, 26-27, attached to Jaspan Aff. (R.38).

[4]See also Whorton Aff. Ex. C, JA 193 ("Since lead is an accumulative toxicant which is stored in the bone, with a half-life in the body of 5 to 7 years, a woman with a significant body lead burden would pose a potential hazard to any conceptus for many years after exposures");

It was precisely because of this continuing threat to "the growing brain of the fetus" that the Centers for Disease Control, U.S. Department of Health and Human Services, announced several years ago that "[t]he prevention of lead exposure to the fetus needs special emphasis. *Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs.*" CDC, *Preventing Lead Poisoning in Young Children* (1985), JA 183-184 (emphasis added).

3. In promulgating its 1978 occupational lead-exposure standard, see 29 CFR § 1910.1025, the Occupational Safety and Health Administration (OSHA) recognized, on the basis of the evidence then available, that a fetus's blood lead level should not exceed 30 micrograms per deciliter of whole blood (μg/dl).[5] However, OSHA's standard generally requires an employee's removal from a high-lead work environment only where his or her blood lead level is at or above 50 μg/dl, a level far higher than that conceded to be dangerous to fetal health. See 29 CFR § 1910.1025(k)(1)(i)(D). Although OSHA expressed the hope that other measures such as employee education and additional biological and air monitoring could further reduce fetal risk, see 43 Fed. Reg. 52,966 (1978), its maximum lead absorption limit

Scialli Aff. ¶ 12, JA 182 ("during the nine months of gestation the fetus will be exposed to harmful levels of lead from the mother's blood despite removal of the mother, thus creating a significant risk that the child will be born with a neurologic injury"); Chisolm Aff. ¶ 10, JA 200-201 ("if a woman is exposed to blood lead levels in excess of 25 or 30 micrograms for any length of time, such levels will not decrease sufficiently to avoid damage to the fetus, even if she is removed when the pregnancy is discovered"); Silbergeld Dep., JA 232 ("within a year or so there would be a reduction in lead").

[5]OSHA noted that "[t]he Center for Disease Control, the Toxicology Committee of the National Academy of Sciences and the Environmental Protection Agency recommend that blood lead levels of children be kept below 30 μg/100 ml. Certainly the fetus and newborn should be similarly protected." 43 Fed. Reg. 52,966 (1978). OSHA also found "conclusive evidence that lead crosses the placenta of pregnant women and enters the fetal tissues," that "the fetus is highly vulnerable whatever the stage of development," and that "[t]he fetus is particularly susceptible to neurological damage." *Id.*, at 52,965-52,966.

for adults clearly does not avoid the fetal injuries described above —as UAW experts themselves emphasized. See, *e.g.*, Legator Dep., JA 257. Indeed, OSHA cautioned that individual company safety practices might need to be "more stringent than the specific provisions of the [lead] standard" and that company physicians might in certain instances need to remove women from high-risk positions precisely "so that prior lead exposure will not harm the fetus." 29 CFR § 1910.1025 App. C, p. 182 (1989); 43 Fed. Reg. 52,974; see also *id.*, at 52,966.[6]

4. It is the fetus's *direct* exposure to the maternal blood lead levels involved here that causes the injuries described above. The UAW unsuccessfully sought below to create a genuine factual dispute as to whether equivalent fetal injuries are *genetically* caused by malformed sperm ("teratospermia") from male workers *with equivalent blood lead levels.* As the Court of Appeals concluded, the evidence of such an equivalent risk "is, at best, speculative and unconvincing." Pet. App. 34a.

Specifically, the available evidence (including OSHA's 1978 rulemaking record) suggests that men with roughly equivalent blood lead levels may have an elevated risk of temporary reduction in fertility—*i.e.*, decreased number of sperm ("hypospermia") or sperm with decreased motility ("asthenospermia")—a problem that can be monitored and corrected on an individualized basis without permanent reproductive injuries. The evidence, however, establishes that risks of birth defects or other fetal injuries caused by deformed sperm occur, if at all, only at much *higher* paternal blood lead levels than those in issue.[7]

[6]OSHA also recommended the removal in certain instances of men planning to father a child, but for distinctly different reasons. Whereas removal of a woman would be necessary "so that prior lead exposure will not harm the fetus," the reason for removing men would be "so that their sperm can regain sufficient viability for fertilization." 43 Fed. Reg. 52,974.

[7]OSHA, for example, has noted that while hypospermia and asthenospermia have been detected at 41 μg/dl—11 micrograms above

Those higher levels are avoided through compliance with OSHA's maximum lead absorption limits applicable to all employees. OSHA's limits do *not* prevent the fetal injuries described above, which result from the fetus's unique dependence upon the maternal environment and are inflicted at much lower blood lead levels.[8]

The UAW also sought to rely on rodent studies in positing that male-transmitted fetal injuries might occur at lead levels comparable to those involved here. The evidence, however, established that those studies cannot be extrapolated to humans given the material differences between human and rodent reproductive systems. See Pet. App. 34a & n.29. Even UAW experts ultimately conceded that the evidence of "male-mediated" risks at the lead levels in question is, at best, speculative: as one acknowledged, "[w]e don't know" whether such risks really exist, Brix Dep., JA 265; another agreed that male-mediated harm is "an unknown in terms of the precise levels," Legator Dep., JA 257.[9] That is a far

Johnson Controls' initial maximum allowable limit for fertile women—teratospermia (malformed sperm) have been detected only at the much higher level of 53 μg/dl, more than twice the maternal blood lead levels now known to pose substantial dangers of direct and irreversible harm to fetuses. See App. C to 29 CFR § 1910.1025, p. 185. The discussion of the OSHA rulemaking record in *United Steelworkers* v. *Marshall*, 208 U.S. App. D.C. 60, 127-128, 647 F.2d 1189, 1256-1257 (1980), cert. denied *sub nom. Lead Industries Ass'n* v. *Donovan*, 453 U.S. 913 (1981), similarly points to no evidence of fetal injuries caused by male blood lead levels equivalent to those involved in this case.

[8]On the absence of male-mediated fetal harm at the blood lead levels in question, see generally Pet. App. 33a-35a; JA 15-16, 20; Chisolm Aff. ¶¶ 7-8, JA 199-200; Scialli Aff. ¶¶ 8, 10, JA 180-181; Hammond Aff. ¶¶ 7-8, JA 72-74; Whorton Aff. ¶¶ 6-7, JA 186; Chisolm Dep., JA 171-176; Fishburn Test., JA 154-157; Fishburn Test. 88-89, attached to Jaspan Aff. (R.38).

[9] Another UAW expert asserted that, while he had done no independent studies or examinations in this regard, he believed the scientific literature he had seen showed that male-mediated risks are analogous to the risks *in utero* at comparable blood lead levels. The expert then was asked to review the literature he had in mind on an article-by-article basis. As he conceded, each article either involved male blood lead levels

cry from the "overwhelming evidence" and " 'general consensus within the scientific community' " as to the irreversible destruction caused by fetal exposure to the maternal blood lead levels here in issue. Pet. App. 20a (citation omitted).

5. The health risks to fetuses are significantly greater than those to adults at these blood lead levels. *First*, as UAW expert Marvin Legator explained, there is "[n]o question" that fetuses and young children are "certainly" more sensitive to lead than adults. JA 253-254; see also JA 16; Chisolm Aff. ¶8, JA 200; Whorton Aff. ¶ 9, JA 187; Fishburn Test., JA 148-151; CDC, *Preventing Lead Poisoning in Young Children*, JA 183-184; n.1, *supra*.

Second, adult effects such as mood swings, high blood pressure (which can lead to increased risk of heart disease), and temporarily reduced male fertility can be and are monitored and controlled; when ill effects in employees are detected, corrective actions, including removal when necessary, can be and are taken.[10] Such individualized monitoring of the effects of lead is impossible with a fetus. See Scialli Aff. ¶ 6, JA 180; see also Fishburn Test., JA 151, 154, 161-162. Moreover, while the adult effects are reversible with proper monitoring and corrective actions, the injuries to a fetus's developing brain and central nervous system are not. See Scialli Aff. ¶ 10, JA 181; *supra*, at 1-3.

B. Johnson Controls' Responses To These Risks

Johnson Controls is a manufacturer of automotive and specialty batteries. The use of lead is unavoidably an integral part of its operations because "[l]ead is the principal active material used

much *higher* than those at issue here or else "did not attempt to guess what those blood-lead levels might have been." Silverstein Dep., JA 212; see also *id.*, at 204, 206, 209, 211-215, 217-221. His affidavit ultimately took a different tack: rather than asserting *evidence* of male-mediated risk at the levels in question, it concluded that the *absence* of additional studies justified a *presumption* of such risk. Silverstein Aff. ¶ 4, JA 261-262. This is the same approach followed in the *amici* brief of the American Public Health Association, *et al.*

[10]See Fishburn Test., JA 147-148, 153, 162-163; Fishburn Test. 20, attached to Jaspan Aff. (R.38); Beaudoin Test., JA 89-91; JA 114-137.

in batteries. It is the main ingredient in the paste which forms the plates of the batteries, and it forms the structure for all the conductive elements in the battery for transmitting current." JA 4.[11]

Johnson Controls has long been a recognized industry leader in its comprehensive efforts to protect employees and their families from the adverse effects of lead.[12] The company's programs, which long predated OSHA regulation in this field, exceed OSHA's current requirements in numerous respects and have reduced the blood lead levels of its employees well below OSHA's projected target levels. See Beaudoin Test., JA 92-93, 97; JA 145-146. As the courts below found, however, neither Johnson Controls nor anyone else has to date been able "to utilize engineering research and technology to implement a system or procedure capable of reducing the lead exposure of its employees to acceptable levels for fertile women." Pet. App. 9a; see also JA 17 ("it is apparent that the company is doing all that it can to reduce lead exposure levels to safe levels").

As one part of its broader industrial safety efforts, Johnson Controls implemented its first fetal protection policy in 1977. Although that policy "stopped short of excluding women capable of bearing children from lead exposure," it strongly recommended that women *not* work in high-lead areas if they were considering a family. JA 138. Women received individualized

[11]Johnson Controls "has attempted to develop an alternative to lead acid batteries in order to totally eliminate lead exposure; however, these attempts have been completely unsuccessful to date." Beaudoin Aff. ¶ 17, JA 78; see also Pet. App. 59a n.43 (no lead-free battery is presently available).

[12]These long-standing efforts include elaborate engineering, ventilation, and workplace inspection controls; extensive biological monitoring, medical surveillance, and employee counseling and education programs; detailed programs for respirator use, employer-provided clothing and shoes, personal hygiene, improved work practices, and paid wash-up and shower time; and the transfer to other positions of employees who show signs of excessive lead absorption (with no reduction in pay or other benefits). See, *e.g.*, Pet. App. 3a-4a; Beaudoin Test., JA 87-102; Beaudoin Aff. ¶ 6, JA 76; JA 104-137 (reprinting various programs).

health counseling from company medical personnel and were asked to sign a statement that the company had explained the childbearing risks of high-lead exposure—not in an attempt to effect a waiver, but "as a means of emphasizing the gravity of the situation." Beaudoin Test., JA 95; see also JA 138-144. Johnson Controls tried this program for five years but found a continuing situation in which, notwithstanding its best efforts, "number one, a high number of women who were capable of bearing children [had] high blood leads and, even more to the point, we were seeing a substantial number of pregnancies where the blood leads of the mother were well in excess of 30 [μg/dl]." Beaudoin Test., JA 94; see also Beaudoin Aff. ¶ 16, JA 77-78; Beaudoin Aff. Ex. K (R.37). At least one of the infants born to this group showed early signs of fetal lead poisoning. See generally Pet. App. 6a-8a.

Based on the failure of these earlier attempts, in light of the growing evidence of the substantial health risks involved, and at the specific urging of its plant physicians and outside medical consultant, Johnson Controls in 1982 adopted the fetal protection policy at issue in this case. See JA 94, 153; see also JA 80-86. As described in further detail by the Court of Appeals, the policy generally prohibited women who are capable of bearing children from working in jobs where there was a likelihood that their blood lead levels would rise above 30 μg/dl—the Centers for Disease Control's standard then in effect. Pet. App. 5a-6a & n.7.[13] Employees covered by the policy who already were in such high-risk positions were permitted to remain in those positions if they were able to maintain their blood lead levels below 30 μg/dl; those who could not were transferred to other positions and paid medical removal protection ("MRP") benefits to compensate for

[13]Although the UAW now argues that Johnson Controls might have used other methods in determining likelihood of high blood lead levels in particular positions, see UAW Br. 3-4, 47-48, it made no such argument to the Court of Appeals and, as that court found, thereby waived the issue. See *infra*, at 12-13, 45-48.

lost earnings.[14] Women who were not then in high-risk positions were not allowed to transfer into them.[15]

Since 1982, Johnson Controls has continued to implement engineering controls to reduce the lead exposure and blood lead levels of all employees, and it continues to review, update, and refine its program in light of the best available medical evidence so as to reduce fetal health risks while minimizing the effect upon fertile women.[16]

C. The Proceedings Below

In the District Court, the parties stipulated to the certification of a class consisting of certain past, present, and future employees affected by the fetal protection policy. After the parties had been given a full opportunity for discovery, Johnson Controls moved for summary judgment and submitted extensive evidence, including the deposition and affidavit testimony of eminent medical

[14]Significantly, whereas OSHA only requires the payment of MRP benefits for 18 months after transfer (29 CFR § 1910.1025(k)(2)), a woman transferred under Johnson Controls' policy receives MRP benefits indefinitely until she either no longer is capable of childbearing or declines to accept a position equal in pay, benefits, and seniority to the one from which she was transferred. JA 81, 97.

[15]Johnson Controls does not encourage sterilization. Its policy expressly cautions that it "is in no way intended to support or encourage women of childbearing capability to seek to change this status. Employees are strongly advised against any such action." JA 80, 86.

[16]Two changes are of particular note. *First*, Johnson Controls' 1982 policy extended to jobs in "lines of progression" that contained high-risk positions. Although this provision was not at issue below, we call to the Court's attention that it was eliminated after the record in the case had been closed; the policy now is applied only on an individual job-by-job basis. (The provision was not at issue below because it applied only to *applicants* and thus did not affect the certified class—*employees*—represented by the UAW. Nor did the UAW challenge the provision in the Court of Appeals.)

Second, and also after the record had been closed, Johnson Controls lowered the policy's action level from 30 to 25 μg/dl in response to the CDC's revision of its recommended maximum "umbilical cord blood level[ ]" for lead. See *supra*, at 4; JA 183-184. Johnson Controls called both of these changes to this Court's attention in its brief in opposition (at 8 n.16) to the UAW's petition for certiorari.

experts documenting lead's toxic prenatal effects and the need for the company's policy.[17]

The District Court followed the lead of the Fourth and Eleventh Circuits in adopting a modified "business necessity" analysis which, like a BFOQ analysis, placed on Johnson Controls the burden of demonstrating (1) substantial risks of fetal harm at the blood lead levels in issue and (2) that transmission of that harm occurs through female but not male employees at these levels. JA 10-14.[18] The District Court found the record evidence created no *genuine* dispute with respect to either issue: the risks are substantial and "too serious for this Court to find unimportant," and at the 30 μg/dl level "this expo-

[17]Dr. J. Julian Chisolm, Jr. (JA 165-178, 198-201) is Director of the Lead Program at the John F. Kennedy Institute in Baltimore and Associate Professor of Pediatrics, Johns Hopkins School of Medicine. He operates a clinic for the treatment of children with lead poisoning and has authored over 70 journal articles, book chapters, and conference papers on lead poisoning, most of which focus upon the prenatal and childhood effects of lead exposure. JA 198-199; Ex. B to R.42. Dr. Anthony R. Scialli (JA 179-182) is Director of the Reproductive Toxicology Center in Washington, D.C., which "serves as a source of information on the potential reproductive toxicity of environmental and physical agents." JA 179. An obstetrician, he has done extensive research on the effects of lead on reproductive health. Dr. M. Donald Whorton (JA 185-187) is Associate Clinical Professor of Occupational Medicine at the University of California School of Public Health in Berkeley and Senior Occupational Physician/Epidemiologist at Environmental Health Associates, Inc. in Oakland, California. One area of his research has focused upon the effects of lead exposure on semen quality. JA 185-186. Dr. Paul B. Hammond (JA 71-74) is Professor of Environmental Health at the University of Cincinnati. He has done substantial research on lead toxicity and has directed a study analyzing the impact of *in utero* and postnatal lead exposure upon the subsequent mental development of children. JA 71-72. Dr. Charles W. Fishburn (JA 147-164) is Assistant Clinical Professor at the Universities of Wisconsin and Colorado in their Departments of Preventive Medicine. He is board certified in occupational medicine, has evaluated over 25,000 individuals for lead exposure, and has treated several thousand patients for the effects of lead poisoning. Fishburn Test. 3, 8-9, attached to Jaspan Aff. (R.38).

[18]See *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1548-1549 (CA11 1984); *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1190-1191 (CA4 1982).

sure exists only for pregnant women. Men simply cannot expose a fetus to lead in the same way women can." *Id.*, at 18, 20.[19]

On appeal, the UAW argued that gender-based fetal protection measures should be evaluated only on a BFOQ standard and declared unlawful *per se* under Title VII. The UAW also advised the Court of Appeals that it had decided to pursue only the factual issues involving relative safety risks; these issues were "the *only* ones that will determine the outcome of this case." UAW Seventh Cir. Br. 37-38 (emphasis added). The UAW specifically advised the court that it was not pursuing "[t]he other material fact that would ordinarily be at issue in a case of this type," namely, "the question of whether there were alternative policies which the defendant could have adopted, other than the Fetal Protection Policy, which would have had a less disproportionate affect [*sic*] on the women workers." *Id.*, at 36-37 n.14.[20]

The Court of Appeals affirmed the District Court's judgment in a 7-4 *en banc* decision.[21] The majority concluded that Johnson Controls was entitled to summary judgment under *either* a business necessity *or* a BFOQ analysis and that the allocation of proof burdens was *irrelevant* given the record evidence in this particular case: if a business necessity analysis was used and the burden of persuasion placed on the UAW (pursuant to *Wards*

[19]The District Court also found that the UAW had failed to establish "an acceptable alternative that would have a lesser impact on females." JA 20. The UAW waived this issue on appeal. See *infra*, at 13, 45-48.

[20]Other than in the footnote quoted above, the UAW's brief nowhere discussed the question of possible alternatives to Johnson Controls' policy. The company noted in its appeal brief (at 33) that "the UAW does not even contest this point"; the UAW's reply brief was silent on the matter. As the Court of Appeals emphasized, "[t]he UAW, in its briefs and argument, has failed to present even one specific alternative to Johnson's fetal protection policy." Pet. App. 40a.

[21]Two of the dissenting judges, while disagreeing that summary judgment had been appropriate on the specific record before the District Court, agreed with the majority that Title VII does *not* prohibit gender-drawn fetal protection measures as a matter of law. See Pet. App. 60a (Cudahy, J.); *id.*, at 69a (Posner, J.).

Cove Packing Co. v. *Atonio*, 109 S. Ct. 2115 (1989)), Johnson Controls was entitled to summary judgment;[22] if instead a BFOQ analysis was used and the burden of persuasion on all issues placed on Johnson Controls, Johnson Controls *still* was entitled to summary judgment. Pet. App. 42a, 48a-54a, 58a-59a.

With respect to the risk issues, the court found "clear and unrefuted evidence in the record of a substantial and irreversible risk to the unborn child's mental development from lead exposure in the womb" at the maternal blood lead levels in question. Pet. App. 53a; see also *id.*, at 32a. In contrast, the evidence of male-mediated harms at these levels was, "at best, speculative and unconvincing"; Johnson Controls had established that lead poses toxic dangers "in particular, to the offspring of female employees." *Id.*, at 34a, 48a. Finally, although the company had documented its careful consideration of a number of less restrictive potential alternatives and why they were inadequate, the UAW "did not respond" to this evidence and had advised the court that the question of alternatives was not "at issue" in the case. UAW Seventh Cir. Br. 36-37 n.14. The Court of Appeals accordingly found that the UAW had waived the issue pursuant to Fed. R. App. P. 28(a)(4). Pet. App. 36a-38a. Johnson Controls' demonstration of the absence of feasible alternatives to its policy thus stood unrefuted.

The UAW has not sought review of the Court of Appeals' waiver holding. Nor has it sought review on the question whether the courts below properly applied the standards of Fed. R. Civ. P. 56 to the particular evidence of record. See Pet. Cert. Reply

[22]The Fourth and Eleventh Circuits had placed the burden of persuasion with respect to the "substantial risk" and "male mediation" issues upon the defendants in their modified business necessity analyses. See n.18, *supra*. So had the district court below. See *supra*, at 11-12. On appeal, Johnson Controls presented its case on the premise that it bore the burden of persuasion on these issues. After the briefs had been submitted to the Court of Appeals, this Court clarified that the burden of persuasion always remains on the plaintiff in a disparate impact/business necessity case. *Wards Cove*, 109 S. Ct., at 2126.

Br. 6-7 n.4 ("we do not argue . . . that if the court below is right on the law, the affirmance of summary judgment is wrong").

SUMMARY OF THE ARGUMENT

I. (a) The UAW's fundamental point—that Title VII categorically prohibits *all* fetal protection measures that distinguish among employees on the basis of their sex—has been rejected by the Equal Employment Opportunity Commission (EEOC) and every court of appeals that has considered the issue. Such measures in narrow instances can be "reasonably necessary to the normal operation" of an employer's business and thus permissible under Title VII. 42 U.S.C. § 2000e-2(e)(1). Contrary to the UAW, a manufacturer's "normal operation" is not limited to efficiency goals and product quality issues, but properly includes concern for the direct effects of its toxic hazards upon third-party health and safety. This common-sense reading of Title VII is reinforced by this Court's BFOQ precedents involving safety issues; by the consistently held views of the EEOC; by the views of other federal agencies (including OSHA, EPA, and CDC) that gender-drawn measures are occasionally necessary to protect fetal safety; by the legislative history of Title VII's BFOQ provision; by analogous precedents demonstrating that "external societal moral judgment" (UAW Br. 29 n.27) is not irrelevant in giving content to the BFOQ standard; and by an employer's legal duty (which cannot be parentally waived) to avoid injuries to the unborn resulting directly from the hazards of its own manufacturing operations. It would, in sum, be distinctly *abnormal* to conclude that Congress intended through Title VII to *require* an employer knowingly to expose unborn children to a toxic hazard shown to pose substantial risks of irreparable physical and mental harm. See *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1786 (1989) (plurality opinion) ("We need not leave our common-sense at the doorstep when we interpret a statute").

(b) Neither the Pregnancy Discrimination Act (PDA) nor the Occupational Safety and Health Act (OSH Act) alters these conclusions. The PDA amended the definition of "sex"

discrimination to include pregnancy-based and related classifications, but such classifications continue to be permissible where "reasonably necessary to the normal operation" of the particular business in issue. Moreover, OSHA's regulations set the floor, not the ceiling, for occupational health and safety.

(c) The three-part analysis followed by the courts of appeals strikes the appropriate "balance of rights" embodied in Title VII, *Price Waterhouse* v. *Hopkins*, *supra*, at 1788, and fully comports with this Court's BFOQ precedents. That analysis allows employers to adopt effective fetal protection measures while requiring that they do so with the least discriminatory impact possible. Although the BFOQ standard is appropriately an exacting one, employers should be given some latitude in structuring industrial safety practices "which, if they err at all, should err on the side of preservation of life and limb." *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (CA5 1976).

II. The judgment below should be affirmed. The Court of Appeals properly concluded that Johnson Controls was entitled to judgment under either a business necessity or a BFOQ analysis and irrespective of how proof burdens were allocated. Moreover, the UAW has not sought review on whether the standards of Fed. R. Civ. P. 56 were properly applied to the record evidence. In addition, having told the Court of Appeals that the question of adequate but less restrictive alternatives was not "at issue" in this case, and having thereby waived the issue (as the court below held), the UAW cannot now be heard to argue for a reversal on the ground that the issue received insufficient consideration.

ARGUMENT

I. TITLE VII ALLOWS AN EMPLOYER TO ADOPT A GENDER-DRAWN FETAL PROTECTION POLICY IN CERTAIN NARROW CIRCUMSTANCES

Every court of appeals considering the issue has concluded that, in narrow circumstances, medically validated fetal protection policies using gender classifications are lawful under Title

VII. The EEOC, the federal agency charged with primary enforcement of Title VII, has consistently shared this view. Moreover, the courts and the EEOC have considered the same underlying factors in assessing the validity of particular fetal protection policies. While taking different positions on whether these factors should be described as a business necessity or BFOQ analysis, they all have concluded that a challenged policy is proper where

> (a) there is a substantial risk of harm to employees' offspring through workplace exposure to toxic hazards;
>
> (b) the transmission of that harm to offspring is confined to employees of one sex; and
>
> (c) there are no adequate but less discriminatory alternatives to the employer's policy.[23]

The UAW argues, however, that gender-drawn fetal protection measures can *never* be lawful under Title VII because the safety of third parties is a "non-job-performance related concern[ ]" irrelevant to an individual's ability "to perform the assigned tasks" —here the manufacture of batteries "efficiently and proficiently." UAW Br. 30-31, 34. Title VII, the argument continues, only allows employers to consider "production-related" concerns and forbids them from accommodating "external societal moral judgment" about the way business should operate. *Id.*, at 29 n.27, 33.

[23]In addition to the Seventh Circuit's opinion below (Pet. App. 20a-28a), see *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1548, 1552-1553 (CA11 1984); *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1190-1192 (CA4 1982); EEOC, *Policy Guidance on Reproductive and Fetal Hazards* (Oct. 3, 1988) (hereinafter *EEOC 1988 Policy Guidance*), reprinted in Fair Emp. Prac. Manual (BNA) 405:6613; EEOC, *Policy Guidance on United Auto Workers* v. *Johnson Controls, Inc.* (Jan. 24, 1990) (hereinafter *EEOC 1990 Policy Guidance*), reprinted in Pet. App. 127a-144a. As the EEOC observed in its *1990 Policy Guidance*, the "pertinent questions" are the same "whether one applies the BFOQ or the 'business necessity' analysis." Pet. App. 138a-139a.

Implicit in the third factor is the requirement that the policy actually and effectively reduce the health risks to unborn children. "In other words, to avoid Title VII liability for a fetal protection policy, an employer must adopt the most effective policy available, with the least discriminatory impact possible." *Hayes, supra*, at 1553.

This argument is inconsistent with the statutory language, the legislative history, relevant precedents, and sound public policy. Protecting third parties—including fetuses—from substantial health and safety risks arising directly out of the manufacturing process is "reasonably necessary" to a responsible employer's "normal operation" and thus can constitute a BFOQ in narrow circumstances.[24]

A. Avoiding Substantial Risks Of Injury To Third Parties—Including Unborn Children—Is "Reasonably Necessary" To A Manufacturer's "Normal Operation"

1. *The Statutory Language.* The plain language of the BFOQ standard allows an employer to use gender-drawn distinctions where "*reasonably* necessary to the *normal* operation of [its] particular business or enterprise." Title VII § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (emphasis added). Contrary to the UAW's underlying premise, Congress's choice of the value-laden word "normal" necessarily requires a court to look to "external societal moral judgment" about how business should operate when giving

[24]Of course, before the BFOQ issue is reached, the Court must first conclude that Johnson Controls' policy constitutes disparate treatment. Our brief proceeds on the assumption that it does. However, as shown by the *amicus* brief of the Chamber of Commerce, a policy such as Johnson Controls' can be viewed as not automatically constituting disparate treatment; under the Pregnancy Discrimination Act, a plaintiff must first demonstrate that she has been treated differently from others whose employment in the job at issue would create a similar risk to unborn children.

In addition, we agree with every court of appeals considering the issue that fetal protection measures can be analyzed under a business necessity inquiry. See Pet. App. 20a-28a; *Hayes*, 726 F.2d, at 1548-1549, 1552-1553; *Olin*, 697 F.2d, at 1184-1186. If a policy differentiated among employees based on the degree of risk to the unborn that their employment in a particular job would cause, it would properly be viewed as being facially neutral. As the court in *Hayes* observed, where it is established that a substantial fetal risk is transmitted only through the exposure of one gender to a workplace hazard, a policy that responds to that risk is similarly neutral "in the sense that it equally protects the offspring of *all* employees," albeit with a disproportionate impact which must be justified. 726 F.2d, at 1552 (emphasis added). Fetal protection policies should be uniformly analyzed whether they

content to this standard. UAW Br. 29 n.27.[25] Chief among these "moral judgments" is the imperative of industrial safety. In this day and age, it cannot seriously be disputed that a company's desire to avoid direct harm to its employees and their families, its customers, and its neighbors from its own toxic hazards goes to the heart of its "normal operation." As the United States and the EEOC observe in their *amici* brief (at 16), "[a] broad variety of societal sanctions—ranging from statutes and regulations to tort liability, and from administrative fines to criminal penalties—reflect the importance of this concern." Judge Posner in his separate opinion below put an even sharper point on this proposition: the phrase "*normal* operation"

> should dispel concern that consideration of all interests other than the employer's interest in selling a quality product at the lowest possible price is precluded. It is possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal. . . .
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> • • • •
>
> ". . . In particular, the 'normal operation' of a business encompasses ethical, legal, and business concerns about the

refer expressly to gender or instead to "neutral" criteria that in turn implicate gender. See *Olin, supra,* at 1186. As the Court of Appeals noted below, this Court has emphasized the need to avoid inflexible application of Title VII proof patterns to particular factual situations. Pet. App. 20a-21a (citing, *e.g., Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 575-576 (1978); *Teamsters* v. *United States,* 431 U.S. 324, 358 (1977). This Court also has observed that both a business necessity and a BFOQ analysis "may, of course, be applied to a particular set of facts." *Teamsters, supra,* at 336 n.15.

[25]"Normal" means "according to, constituting, or not deviating from an established norm, rule, or principle: conformed to a type, standard, or regular pattern." *Webster's Third New International Dictionary* 1540 (1981); see also *Black's Law Dictionary* 955 (5th ed. 1979) ("performing the proper functions"); *The Random House Dictionary of the English Language* 1321 (2d ed. 1987) ("normal" means, *e.g.,* "free from any infection or other form of disease or malformation").

> effects of an employer's activities on third parties. An employer might be validly concerned on a variety of grounds both practical and ethical with the hazards of his workplace to the children of his employees." Pet. App. 64a-66a.

See also *id.,* at 69a (Posner, J.) (equating "normal" with "civilized, humane, prudent, ethical"); *id.,* at 60a n.1 (Cudahy, J.); U.S. and EEOC *Amici* Br. 17 ("A concern with direct harm to third parties from the manufacturing process fits comfortably within the scope of an element 'reasonably necessary to the normal operation of [a] particular business or enterprise' ").[26]

2. *Safety Cases.* This Court's precedents underscore that an employer's reasonable concern for the direct effects of its operations upon the safety of others can constitute a BFOQ. In *Dothard* v. *Rawlinson,* for example, the Court explained that, "[i]n the *usual* case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." 433 U.S. 321, 335 (1977) (emphasis added). Where "[m]ore is at stake" than the individual's own well-being, however, safety risks can become a compelling consideration supporting gender-drawn classifications. *Id.,* at 335-336 (permissible to exclude women guards from a "male, maximum-security, unclassified penitentiary" where their presence would pose "a real threat" to themselves, other security personnel, and inmates).

[26]The UAW also argues that third-party safety concerns cannot support a BFOQ because they "apply to a broad range of businesses," whereas the statute requires a court to look only to the normal operation of the "particular business" in question. UAW Br. 42-43. This reasoning is untenable. Valid "normal operation" concerns cannot be transformed into illegal discrimination simply because they pertain to many businesses. The inquiry instead is whether the presence of the specific hazard is reasonably necessary in the particular business in question. As the Court of Appeals emphasized below, lead exposure is presently an unavoidable consequence in the "particular business" of a battery manufacturer. Pet. App. 9a; see also *id.,* at 59a n.43 ("if ever a lead-free battery were developed, the problems in this case would fall by the wayside"). Such exposure is not reasonably necessary in the operations of most other businesses, just as exposure to most hazards other than lead is not reasonably necessary to Johnson Controls' particular business.

Similarly, the Court emphasized in *Western Air Lines, Inc.* v. *Criswell* that, "[i]n adopting [the BFOQ] standard, Congress did not ignore the public interest in safety." 472 U.S. 400, 419 (1985). In that case arising under the Age Discrimination in Employment Act, the Court stressed that the BFOQ inquiry must " 'adjust[ ] to the safety factor' " where " 'reasonably necessary' to further the overriding interest in public safety." *Id.*, at 413 (quoting *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (CA5 1976)). Cf. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979) (business necessity defense).

The UAW argues that *Dothard* and *Criswell* are inapposite because the "safety concerns" in those cases "were not *independent* of the individual's abilities to perform the assigned tasks"—in *Dothard* the maintenance of prison security, in *Criswell* the safe transport of airline passengers—whereas here, the third-party safety risk is "independent" of an employee's ability to produce batteries "efficiently and proficiently." UAW Br. 30-31 (emphasis added); see also Pet. App. 85a (Easterbrook, J., dissenting) (distinguishing *Criswell* on the ground that "Johnson is not using sex to avert harm to customers"). These purported distinctions find no warrant in Title VII and merely beg the question of what responsibilities are encompassed in a company's "normal operation." Our society has made the judgment that it is distinctly *abnormal* for manufacturers to be concerned only with the "efficient" and "proficient" operation of their own enterprises, and has imposed duties to avoid harm from their products and operations that extend far beyond their own employees or customers.[27] The language of the BFOQ provision shows that, far from restricting these broad duties recognized by society, Congress intended to accommodate them.

Under *Dothard* and *Criswell*, the appropriate inquiry is whether an employer's justification is of only "peripheral" significance or instead bears on the "central mission" and the "es-

[27]See generally *Prosser and Keeton on the Law of Torts* §§ 30-31, 53-57, 60-61, 63-64, 69-81, 87-88, 96, 98-101 (5th ed. 1984); Restatement (Second) of Torts §§ 1, 4 (1965).

sence" of its "normal operation." *Dothard*, 433 U.S., at 333-337; *Criswell*, 472 U.S., at 413, 416 n.24.[28] Given "the overriding interest in public safety," *id.*, at 413, a company's concern for the direct effects of its manufacturing operations upon the health and safety of others can *never* be characterized as a "peripheral" concern, but instead must be viewed as "central" to its normal operation. See Pet. App. 48a-49a.

3. *Agency Views.* The views of the EEOC and other federal agencies bolster the conclusion that gender-drawn employment practices designed to protect the health and safety of unborn children are occasionally "reasonably necessary to the normal operation" of business.

(a) The EEOC has always held the view that Title VII does not *per se* invalidate gender-based fetal protection policies.[29] Although its views on the appropriate analytical methodology have evolved from a business-necessity to a BFOQ framework, the EEOC has emphasized that the "pertinent questions" are the same "whether one applies the BFOQ or the 'business necessity' analysis." *EEOC 1990 Policy Guidance*, *supra* n.23, Pet. App. 138a-139a. On the underlying issue, the agency has consistently

[28]The "essence" language derives from *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (CA5), cert. denied, 404 U.S. 950 (1971), a case that illustrates the error of the UAW's BFOQ analysis. The airline argued there that its "normal operation" included accommodating the desires of some male passengers to have only female cabin attendants. Because these passenger desires (which themselves rested upon stereotyped notions) were "tangential to the essence of the business involved" —the safe transport of passengers—they could not support a BFOQ defense. *Id.*, at 388. On the other hand, an employer may establish a BFOQ where the presence of the restricted class would "jeopardize or even minimize its ability" to operate in a safe manner. *Ibid.* That is precisely the case here.

[29]The agency first took this view in proposed guidelines issued in 1980, 45 Fed. Reg. 7514, which were withdrawn in favor of case-by-case investigation and analysis, 46 Fed. Reg. 3916 (1981). See also EEOC Compliance Manual § 624 (inquiry is whether employer's "exclusionary practice is necessary to the safe and efficient operation of its business"); *EEOC 1988 Policy Guidance*, reprinted in Fair Empl. Prac. Manual

rejected one-sided approaches like the UAW's and instead construed Title VII as preventing "unnecessary limitations on women's employment opportunities, *while preserving the employers' (and society's) legitimate interest in protecting the health of offspring.*" *EEOC 1988 Policy Guidance*, *supra* n.23, reprinted in Fair Empl. Prac. Manual (BNA) 405:6613 (emphasis added); see also *EEOC 1990 Policy Guidance*, Pet. App. 136a. This reasonable interpretation of Title VII is entitled to deference.[30]

(b) Other federal agencies also have endorsed the use of gender where necessary to protect the unborn. For example, OSHA's lead standard emphasizes that company physicians must have "broad flexibility" in evaluating and managing pregnancy-related risks associated with lead exposure—including the use of gender-based protective and removal measures where necessary to protect fetal health. 29 CFR § 1910.1025 App. C, p. 182 (1989).[31] Similarly, beginning in the late 1970s, the Environmental Protection Agency categorically prohibited employers from allowing women of childbearing age to serve as applicators of the fetotoxic pesticide Ferriamicide. Although expressing concern about gender-based classifications, EPA concluded that "[i]n some cases, however, such distinctions are justifiable. . . . [T]he trade-off here was essential" in order to prevent "abnormal children."[32] And as discussed above, the Centers for Disease Control (HHS) have concluded that "[t]he prevention of lead exposure to the fetus needs special emphasis. Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs." JA 184; see also *supra*, at 4.

These views of other agencies do not, of course, control the interpretation of Title VII; that is a task for the courts and the EEOC. They nevertheless are significant. *First*, they demonstrate that fetal protection is not simply part of this one employer's "own moral and ethical agenda" (UAW Br. 34), but is a critical public health concern. *Second*, the considered views of these

(BNA) 405:6616 ("Where substantial evidence exists that the risk of harm to employees' offspring takes place only through the exposure of one sex to a hazard existing in the workplace, an employer may exclude from the workplace employees of that sex, but only to the extent necessary to protect employees' offspring from reproductive or fetal hazards"); *EEOC 1990 Policy Guidance*, Pet. App. 136a ("the Commission concurs with Judge Cudahy's observation that the employer 'may permissibly consider the possible risks to (even potential) third parties in the normal course of business decision making' ") (quoting Pet. App. 60a n.1); U.S. and EEOC *Amici* Br. 16-20.

[30]See *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988) (deference to EEOC's reasonable construction is "axiomatic"); see also *Local No. 93, International Ass'n of Firefighters* v. *Cleveland*, 478 U.S. 501, 518 (1986) (though lacking "the force of law," EEOC guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (internal quotations omitted); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975) (even where not embodied in formal rules, EEOC views entitled to great deference). Even where an EEOC guideline represents a change in the agency's position, it still is "no doubt entitled to great deference" in the absence of " 'compelling indications that it is wrong.' " *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973) (citation omitted); cf. *Mobil Oil Corp.* v. *EPA*, 276 U.S. App. D.C. 352, 355, 871 F.2d 149, 152 (1989) (per curiam) (*Chevron* deference standard applies to agency reinterpretations of statutes). Here, of course, there has been no change at all in the agency's views on the underlying question.

[31]Although OSHA in promulgating its lead standard declined to endorse the broad proposition "that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy," 43 Fed. Reg. 52,966 (1978), it did *not*, contrary to the impression conveyed by the UAW, reject the use of gender-specific fetal protective measures. Thus the lead standard specifically recognizes the propriety of "special protective measures or medical removal for an employee who is pregnant or who is planning to conceive a child when, in the [company] physician's judgment, continued exposure to lead at the current job would pose a significant risk" to fetal health, 29 CFR § 1910.1025 App. C, p. 182—measures that would be invalidated under the UAW's absolutist approach. See also 43 Fed. Reg. 52,974 (removal of female employee may be necessary "so that prior lead exposure will not harm the fetus"; also rejecting proposal that employee consent be a precondition to medical removal); *supra*, at 4-5 & n.6.

[32]See [1979] O.S.H. Rep. (BNA) 1481-1482 (quoting letter of EPA Deputy Administrator Barbara Blum); see also 43 Fed. Reg. 47,774 (1978); 44 Fed. Reg. 11,111, 11,112, 11,116-11,117 (1979); 47 Fed. Reg. 46,885 (1982) ("Women of child-bearing age are prohibited from loading/applying Ferriamicide").

agencies reinforce the conclusion that gender-drawn fetal protective measures are, in certain narrow circumstances, "reasonably necessary" to the normal, safe, and ethical operation of business.

4. *Legislative History of the BFOQ Provision and Relevant Non-Safety Precedents.* The legislative history of § 703(e), together with cases construing the BFOQ defense in contexts other than third-party safety, further undermine the UAW's absolutist position.

As one analysis of the legislative record has concluded:

> "That sex was . . . to be subject to a bfoq exception seems to have been more intuitively felt than explained by the Act's draftsmen. The sponsor of the addition of sex to the clause, Representative Goodell, merely posed the example of an elderly woman in a nursing home who desires a female nurse. Other congressional examples of cases in which sex was a bfoq were an all-male baseball team and a masseur. The Act thus evidences a judgment that *certain functional differences, both physically and culturally defined,* exist between the sexes, and that employers can legitimately accommodate such differences in their hiring patterns." Developments, *Employment Discrimination And Title VII of The Civil Rights Act of 1964,* 84 Harv. L. Rev. 1111, 1176 (1971) (emphasis added).[33]

[33]See also 110 Cong. Rec. 2718 (1964) (remarks of Rep. Goodell in proposing addition of "sex" as a BFOQ) ("There are so many instances where the matter of sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse. There are many things of this nature which are bona fide occupational qualifications, and it seems to me they would be properly considered here as an exception"); *id.*, at 7213 (interpretative memorandum submitted by Sens. Clark and Case) ("This exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion").

Consistent with Congress's intent, this Court has emphasized that Title VII permits employment classifications grounded on "*actual physical*" differences between the sexes, as opposed to "archaic or stereotypical notions." *California Federal Savings & Loan Ass'n* v. *Guerra,* 479 U.S. 272, 290 (1987) (emphasis in original) (upholding differential pregnancy-disability benefits); see also *Dothard* v. *Rawlinson,* 433 U.S., at 334-337. Cf. *Michael M.* v. *Superior Court of Sonoma County,* 450 U.S. 464, 481 (1981) (Stewart, J., concurring) (equal protection standards do not require one "to pretend that demonstrable differences between men and women do not really exist"). As the Court of Appeals explained below, Johnson Controls' fetal protection policy is consistent with these principles because it rests upon medically established "real physical differences" between the sexes, Pet. App. 46a—at the blood lead levels involved here, the substantial risks of permanent brain damage to a child flow directly from its exposure *in utero* to the mother's blood, not from damage transmitted through deformed sperm.

Cases involving patient and customer privacy rights also are significant to the present analysis. Courts have consistently recognized that sex can be a BFOQ in occupations "which require an employee to work with or around individuals whose bodies are exposed in varying degrees." *Norwood* v. *Dale Maintenance System, Inc.,* 590 F. Supp. 1410, 1416 (ND Ill. 1984) (*re* day-shift washroom attendants); see also *Fesel v. Masonic Home of Delaware, Inc.,* 447 F. Supp. 1346, 1350-1354 (Del. 1978) (intimate personal care of elderly women in nursing home), affirmance order, 591 F.2d 1334 (CA3 1979). These cases rest largely upon the recognition that, where an individual is required to reveal intimate bodily areas and functions, "personal privacy interests are implicated which are protected by law and which have to be recognized by the employer in running its business." *Fesel, supra,* at 1352.[34]

[34]" '[A]n accretion of decisional law recognizes that privacy, in both its tort and constitutional manifestations, encompasses the individual's regard for his own dignity; his resistance to humiliation and embarrassment; his privilege against unwarranted exposure of his nude body and

This consensus underscores that the UAW's narrowly defined "ability-to-perform-the-assigned-tasks" standard is not the *sine qua non* of a BFOQ and that "external societal moral judgment" is not irrelevant in giving content to an employer's obligations under Title VII.[35] And if it can be a BFOQ to respect third-party sensitivities for bodily privacy, so much more the case where third-party physical and mental health are at stake. Finally, the BFOQ-privacy cases confirm that Title VII was intended to accommodate legally implicated interests that are directly affected by an employer's activities; that is the essence of "*normal* operation." So it is with this employer.

bodily functions.'" *Backus* v. *Baptist Medical Center*, 510 F. Supp. 1191, 1195 (ED Ark. 1981) (*re* sex as a BFOQ in obstetrics and gynecology nursing care) (citation omitted), vacated as moot, 671 F.2d 1100 (CA8 1982). See also *Moteles* v. *University of Pennsylvania*, 730 F.2d 913, 919-921 (CA3) (assistance of rape victims), cert. denied, 469 U.S. 855 (1984); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1086-1087 (CA8) (prisoner strip searches and surveillance of prisoners' showers and toilets), cert. denied, 446 U.S. 966 (1980); *Jones* v. *Hinds General Hospital*, 666 F. Supp. 933 (SD Miss. 1987) (intimate contact with hospital patients); *Brooks* v. *ACF Industries, Inc.*, 537 F. Supp. 1122 (SD W.Va. 1982) (cleaning of bathhouses); EEOC Dec. No. 76-130 (CCH) ¶ 6692 (Aug. 10, 1976) (counseling mentally handicapped women about intimate matters).

In addition to the privacy cases, see, *e.g.*, *Chambers* v. *Omaha Girls Club, Inc.*, 834 F.2d 697, 703-705 (CA8 1987) (girls' club established BFOQ defense with respect to "role model rule" forbidding unwed pregnant women from serving as staffers); *Pime* v. *Loyola University of Chicago*, 803 F.2d 351, 353-354 (CA7 1986) (maintenance of Jesuit presence in philosophy department of Catholic university a BFOQ).

[35]The UAW contends that it is "controversial whether these cases were correctly decided." UAW Br. 31 n.29. The only support offered for this proposition is *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (CA5), cert. denied, 404 U.S. 950 (1971). As noted *supra*, at 21 n.28, *Diaz* held that customer preference for female airline attendants is not a BFOQ. This has nothing to do with the cases discussed. "[G]iving respect to deep-seated feelings of personal privacy involving one's own genital areas is quite a different matter from catering to the desire of some male airline passengers to have . . . an attractive stewardess." 1 A. Larson, *Employment Discrimination—Sex* § 14.30, at 4-10 (1990).

5. *Legal Duty.* Johnson Controls' concern for fetal safety does not simply reflect its "own moral and ethical agenda" or a quaint regard for the welfare of future generations. UAW Br. 34. The company has a legal duty to avoid injuries to the unborn that result directly from the toxic hazards of its own manufacturing operations. "The child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries . . . ." *Prosser and Keeton on the Law of Torts* § 55, at 368 (5th ed. 1984) (citations omitted); see also Restatement (Second) of Torts § 869 and comment *b* (1979) ("The tortious conduct may be intended to cause harm to the child or the mother, or it may be negligent with respect to either; or it may lie in the field of abnormally dangerous activities, for which strict liability will be imposed").

Moreover, the pronounced trend of authority is to recognize such a duty, enforceable in both negligence and strict liability, to children who *have not yet even been conceived*.[36] And contrary to the UAW's assertion that an employer might discharge this duty simply by cautioning its employees about the risks and leaving the choice entirely to them, UAW Br. 34-36 n.31, the employer's duty runs *directly* to the fetus (or potential fetus); a parent (or

[36]See, *e.g.*, *Bergstreser* v. *Mitchell*, 577 F.2d 22, 26 (CA8 1978) (applying Missouri law in negligence action); *Jorgensen* v. *Meade Johnson Laboratories, Inc.*, 483 F.2d 237, 240 (CA10 1973) (applying Oklahoma law in strict products liability action); *Turpin* v. *Sortini*, 31 Cal. 3d 220, 230-231, 182 Cal. Rptr. 337, 343, 643 P.2d 954, 960 (1982) (en banc) (noting in child's "wrongful life" action the preconception tort rule in negligence cases); *Empire Casualty Co.* v. *St. Paul Fire & Marine Insurance Co.*, 764 P.2d 1191, 1196-1197 (Colo. 1988) (en banc) (preconception negligence established basis for insurance liability); *McAuley* v. *Wills*, 251 Ga. 3, 6, 303 S.E.2d 258, 260 (1983) (negligence action); *Renslow* v. *Mennonite Hospital*, 67 Ill. 2d 348, 359, 367 N.E.2d 1250, 1255-1256 (1977) (same); *Pitre* v. *Opelousas General Hospital*, 530 So. 2d 1151, 1157-1158 (La. 1988) (same); *Monusko* v. *Postle*, 175 Mich. App. 269, 276, 437 N.W.2d 367, 369-370 (1989) (same); *Enright* v. *Eli Lilly & Co.*, 155 App. Div. 2d 64, 70, 553 N.Y.S.2d 494, 497 (1990) (adopting rule in strict products liability action involving special DES statutes of limitations relating to certain toxic substances).

potential parent) can neither waive that duty nor assume the risk on behalf of the child. As Judge Posner emphasized below,

> "[t]he mother's own negligence—for if she had been clearly warned of the hazard, but voluntarily became pregnant anyway and continued to work making batteries, she would be acting negligently with regard to the fetus—would not be imputed to the child and therefore would not reduce the employer's liability. It would merely make the mother a joint tortfeasor with the employer." Pet. App. 66a (citations omitted).[37]

An employer's efforts to honor reasonably perceived legal duties cannot justly be equated with a simple concern for the monetary bottom line—though lower courts have questioned the fairness of forcing an employer knowingly to expose a fetus to its hazardous substances and processes and then requiring it to

[37]See also *Prosser and Keeton* § 74, at 531-532; Restatement (Second) of Torts § 488(1) (1965). Even commentators who otherwise are critical of fetal protection policies have recognized that an employer's legal duties to the unborn cannot be parentally waived. See Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L. J. 641, 646 (1981) ("the woman worker could not waive her offspring's right to sue the employer because a parent's bargain to waive a cause of action belonging to his or her child breaches a trust owed to the child and thus renders the contract illegal and unenforceable") (citations omitted); Becker, *From* Muller *v.* Oregon *to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1244 n.112 (1986) (parent cannot waive unborn child's negligence-based claims) (citations omitted). The majority view is that an employer also owes a *respondeat superior* duty to a child injured through its parent's negligence while the parent was acting in the employer's service. See Annot., 1 A.L.R. 3d 677 § 9 (1965 & Supp. 1989) (collecting cases).

Citing products liability duty-to-warn cases, the UAW argues that a warning might be sufficient to avoid the imposition of strict liability. UAW Br. 34-36 n.31. This is incorrect. In the products liability context, a warning is sufficient only if the product is otherwise "safe for use if [the warning] is followed." Restatement (Second) of Torts § 402A comment *j*. Liability for injuries arising from "abnormally dangerous activities" is avoided through warnings only to the extent that an injured person knows of the risk and voluntarily chooses to take part in the hazardous activity. *Id.* §§ 519-520, 523-524 (1977). As noted above, the law does not absolve an employer's duty toward the unborn child simply because the parent may have knowingly assumed the risk.

compensate for the resulting devastation.[38] This Court observed in *Los Angeles Department of Water & Power* v. *Manhart* that Title VII contains no "cost justification defense" permitting differential treatment between the sexes. 435 U.S. 702, 716-717 (1978). But the question in *Manhart*—how to structure pension contributions and payments—involved no externally imposed legal responsibilities to be balanced against Title VII's principle of equal treatment.

Much more is at stake here. Whether the interest is characterized as fulfilling reasonably perceived legal duties or simply as promoting the overriding societal interest in the health and safety of children, properly crafted fetal protection measures serve a distinctly "higher public policy than simply protecting employers from lawsuits." *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1553 n.15 (CA11 1984). See also U.S. and EEOC *Amici* Br. 16-17 n.13.[39]

The UAW's reasoning ultimately reduces to the proposition that, *if* this Court were to invalidate all gender-drawn fetal protection measures as a matter of law, such a ruling necessarily would invalidate any legal duty that otherwise might impose liability for the failure to use such measures. UAW Br. 34-36 n.31. Although we agree that such a ruling should have preemptive

[38]See Pet. App. 23a-24a n.25; *Zuniga* v. *Kleberg County Hospital*, 692 F.2d 986, 992 n.10 (CA5 1982); see also Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63, 87 (1980) ("It is not seemly that society condone or encourage the malformation of the fetus as a result of exposure to a toxic work environment by first enacting laws that forbid taking the fetus' susceptibility into account and then 'compensating' for the ensuing damage by requiring employers to assume the risk of such births and to insure against it").

[39]*Manhart*, which the UAW relies upon heavily throughout its brief, is distinguishable in another important respect: it dealt with the threshold question of what constitutes "discrimination" within the meaning of Title VII, not with the distinct question of when such "discrimination" is permissible under the BFOQ standard. Specifically, *Manhart* held that an employment practice turning on "unquestionably true" generalizations about "class characteristics," as opposed to "individual characteristics," is "discrimination" under Title VII. 435

effect on inconsistent legal obligations,[40] the UAW's argument fundamentally misperceives the nature of the BFOQ standard. Under the UAW's reasoning, the courts in *Criswell* and *Tamiami* could have held that the responsibility to provide safe passenger transportation was overridden by the ADEA, so that employers could never take age into account; the alarm over increased safety hazards could have been dismissed as a simple "cost justification" concern forbidden by *Manhart*. Likewise, courts could have construed Title VII as annulling otherwise legally protected interests in the personal privacy and dignity of patients and customers; a norm of absolute employment equality would always trump competing rights.

No court ever has viewed Title VII in such a manner. Rather than intending to invalidate legal obligations reflecting "external societal moral judgment" of the way business should be conducted, UAW Br. 29 n.27, Congress chose to *recognize* and *preserve* these obligations by permitting accommodations of Title VII's requirements where "reasonably necessary to the normal operation" of an employer's business. See *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1786, 1788 (1989) (plurality opinion) (emphasis added) (Title VII reflects a "*balance* of rights," and "the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute"). Because Johnson Controls has a reasonably perceived legal duty to protect the health and safety of unborn children, and in any event because of the overriding importance of industrial safety, appropriately drawn

U.S., at 708. The BFOQ defense, which was not advanced by the petitioner in *Manhart*, see *id.*, at 716 n.30, is implicated only once "discrimination" has been established. This Court has emphasized that, in narrow circumstances, "class characteristics" *can* support a BFOQ—for example, where it is impossible or highly impractical to differentiate other than on the basis of membership in the class. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S., at 411, 415-416. Johnson Controls documented why less restrictive alternatives were impractical in this case, and the UAW did not contest the point before the Court of Appeals—indeed, it expressly waived the issue. See *supra*, at 12-13; *infra*, at 45-48.

[40] See *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280-281 (1987); 42 U.S.C. § 2000e-7.

measures in furtherance of these goals are part of its "normal operation" and support a BFOQ defense.

B. The Pregnancy Discrimination Act Did Not Narrow The Scope Of The BFOQ Standard

The UAW contends that, even if third-party safety concerns can constitute a BFOQ in contexts other than pregnancy and childbearing capacity, the Pregnancy Discrimination Act fundamentally altered the scope of the BFOQ in this one area. This argument misconstrues the language, legislative history, and purposes of the PDA.

1. *The PDA's Language.* The UAW focuses on language in the PDA's second clause providing that "women affected by pregnancy, childbirth, or related medical conditions" shall be treated the same as others "not so affected but similar in their ability or inability to work." Title VII § 701(k), 42 U.S.C. § 2000e(k). It contends that the statutory reference to "ability" forbids an employer from taking into account anything but narrowly defined "performance-related considerations" when structuring its industrial safety practices, even where this would prohibit practices "reasonably necessary" to the employer's "normal operation." UAW Br. 31.

One flaw in this analysis is that it incorrectly assumes that one's job "ability" turns simply upon efficient product production, as opposed to *safe* and efficient product production. More fundamentally, as this Court has repeatedly emphasized, the "ability" language is part of a broader provision that redefined "sex" to include "pregnancy, childbirth, or related medical conditions," thus subjecting these conditions to normal Title VII analysis *without substantively altering the terms of that analysis*.[41]

[41] See *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S., at 288-289 ("Rather than limiting existing Title VII principles and objectives, the PDA extends them to cover pregnancy"); *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1084 n.14 (1983) ("the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles"); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 678 n.14 (1983) ("The meaning of the first clause [redefining "sex" discrimination subject to Title VII scrutiny] is not limited by the specific ["ability"] language in the second clause, which explains the application of the general principle to women employees").

Accordingly, Title VII as amended by the PDA continues to permit classifications based on "*actual physical*" differences associated with childbearing, as opposed to "archaic or stereotypical notions about pregnancy and the abilities of pregnant workers." *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S., at 288-289 (emphasis in original). Where such actual physical differences impact on a company's "normal operation" by threatening industrial health and safety, they continue to support a BFOQ defense. See also U.S. and EEOC *Amici* Br. 20 n.18 (PDA does not create "special exemption" for pregnancy from BFOQ standard).[42]

2. *The PDA's Legislative History.* The voluminous legislative history "is virtually void of any testimony or debate on the problem of exposing pregnant women to toxic work environments," containing only "fleeting reference to fetal problems." Furnish, *supra* n.38, 66 Iowa L. Rev., at 77-78. Yet the UAW and its supporting *amici* would have this Court believe that Congress specifically pondered the issue and concluded to outlaw all employer measures to protect fetal health that in any way implicate gender.[43]

Their argument hinges in particular on a statement contained in prepared remarks submitted on behalf of the United States Chamber of Commerce to Senate and House subcommittees considering the legislation, in which a Chamber representative suggested that, among many other perceived problems, the PDA could be read to "prevent an employer from refusing certain work to a pregnant employee where such work arguably posed a threat

[42]The PDA also contains a clause providing that the Act is not to be construed to "require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion . . . ." 42 U.S.C. § 2000e(k). It would be anomalous to interpret a statute that allows an employer to decline to contribute toward the abortion of a fetus as simultaneously *requiring* the employer to expose the fetus to toxic hazards known to cause substantial risks of irreversible brain damage

[43]See, *e.g.*, UAW Br. 38-40 & n.33; Br. *Amici Curiae* of Equal Rights Advocates, *et al.*, at 1-13.

to the health of either the mother-to-be or her unborn child."[44] It is untenable to assert that Congress's failure to "indicate any disagreement" with this remark, which was never repeated in committee reports or legislative debates, demonstrates that Congress thereby approved of this interpretation.[45] "The fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951); see also *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203-204 n.24 (1976) ("Remarks of this kind . . . other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. This is especially so with regard to the statements of legislative opponents who '[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach' ") (citation omitted).[46]

[44]Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 482 (1977) [hereinafter Senate Subcommittee Hearings] (statement of C. Brockwell Heylin, labor relations attorney, Chamber of Commerce). Mr. Heylin submitted a virtually identical statement to the House subcommittee considering the legislation. Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, Part 1, 95th Cong., 1st Sess. 84, 88 (1977).

[45]See Br. *Amici Curiae* of Equal Rights Advocates, *et al.*, at 11; UAW Br. 38-39 n.33. The Equal Rights Advocates' brief goes so far as to hypothesize (at 5, 10) that Senator Hatch, "the leading (though unsuccessful) proponent" of narrowing amendments to the PDA, "chose not even to suggest amending the PDA" in response to Mr. Heylin's remark, which, we are told, shows that he "may" have been persuaded that gender-drawn fetal protective measures should be *per se* unlawful.

It also bears note that the Chamber's Senate subcommittee testimony simply addressed workplace exposure that "arguably posed a threat" to the fetus. A gender-based job transfer in those circumstances clearly would not pass muster under the Seventh Circuit's analysis. See Pet. App. 59a n.43.

[46]The UAW also points to a colloquy between Senator Hatch and Dr. Andre Hellegers during the Senate subcommittee hearings. UAW Br. 38-39 n.33. In response to the Senator's question about whether the

What the UAW and its supporting *amici* ignore are the repeated expressions by proponents of the PDA that the bill would simply amend the definition of "sex" to include pregnancy, without altering in any way the substance of Title VII or the specific contours of the BFOQ "normal operation" standard.[47] Even more fundamentally, they fail to offer any plausible explanation of why Congress possibly might have intended a measure designed in part to *protect* fetal health to be construed as *requiring* an employer *knowingly* to expose the unborn to toxic hazards demonstrated to cause irreparable brain damage. As this Court has counseled, "[w]e need not leave our common-sense at the

PDA "would raise a whole slew of OSHA problems . . . as a result of pregnant women," Dr. Hellegers stated that, "if we are talking about untoward effects [of] the industrial process on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three, and we aren't doing much of that." Senate Subcommittee Hearings, *supra* n.44, at 67.

This discussion hardly suggests that the PDA would prohibit all gender-drawn fetal protective measures, as opposed to requiring that such measures be justified by scientific evidence of actual differences between male- and female-mediated effects on the fetus. That, of course, is precisely what the Seventh Circuit and other courts of appeals have required.

[47]"This bill will make pregnancy-based discrimination subject to the *same scrutiny* on the *same terms* as other acts of sex discrimination, and of course, *provides the employer with the same defense, if proven, that the act recognizes for other forms of sex discrimination* . . . . [P]assage of the bill imposes *no new, unfamiliar or untried legal burdens upon employers or legal principles upon the courts*." Senate Subcommittee Hearings, *supra* n.44, at 117 (testimony of Prof. Wendy Williams) (emphasis added). See also H.R. Rep. No. 95-948, p. 4 (1978) ("Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute"); S. Rep. No. 95-331, pp. 5-6 (1977) (PDA "does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes"); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S., at 679 n.17 (citing extensive legislative remarks that PDA was simply definitional legislation subjecting pregnancy to already-established Title VII principles and would "not really add anything to title VII") (quoting Rep. Hawkins).

doorstep when we interpret a statute." *Price Waterhouse* v. *Hopkins*, 109 S. Ct., at 1786.[48]

C. The OSH Act Does Not Displace The BFOQ Standard

The UAW also argues that Title VII should be construed to prohibit all gender-based fetal protection policies because they implicate "complex social decisions" in areas in which federal judges have "no particular scientific expertise"; the question should instead be relegated to OSHA. UAW Br. 40-42. This reasoning is flawed in at least two critical respects.

First. OSHA standards do not set a *maximum* allowable limit for occupational health and safety. OSHA's lead standard itself

[48]The UAW points to testimony describing the severe effects that a loss of income and benefits could have upon both a pregnant woman and her unborn child, reasoning that, thus apprised of this problem, Congress thereby intended categorically to bar gender-drawn fetal protective measures and to prohibit an employer from having any say in the fetal-safety risks created by its *own* toxic manufacturing operations. UAW Br. 39-40. However, similar economic and health concerns for the groups favored by the ADEA and Title VII as originally enacted were offered at the time as reasons why those measures should be adopted. See, *e.g.*, *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d, at 229 (discussing legislative history of ADEA detailing " 'the cruel sacrifice in happiness and well-being, which joblessness imposes on these citizens and their families' ") (citation omitted); H.R. Rep. No. 1370, 87th Cong., 1st Sess. 1, 1-5 (1962) (*re* predecessor proposal of Title VII) (detailing individual and societal costs of employment discrimination). Such supporting considerations have never been understood to render classifications that are suspect under these laws *per se* illegal (except those drawn on racial lines), but rather to subject them to careful scrutiny under the BFOQ standard. The legislative history of the PDA does not indicate that Congress intended otherwise with respect to pregnancy.

Under Johnson Controls' policy, of course, employees who are transferred from high-risk positions receive full medical removal protection benefits indefinitely to ensure they suffer no reduction in wages and benefits. See *supra*, at 9-10 & n.14. Although applicants who are not permitted into high-risk positions do not receive MRP benefits, it would be odd if Congress had intended, in order to promote fetal health and to compensate for a general societal failure to provide proper prenatal care, to *require* employers to injure the unborn.

provides that physician-recommended safety practices—including those addressed to fetal health and safety—"may be more stringent than the specific provisions of the standard." 29 CFR § 1910.1025 App. C, p. 182 (1989).[49] Moreover, under the OSH Act's general duty clause, 29 U.S.C. § 654(a)(1), an employer who knows that particular OSHA standards are inadequate to protect against the workplace hazards they were intended to address is obligated to go "over and above" those specific standards on its own initiative as necessary to protect health and safety. *UAW* v. *General Dynamics Land Systems Division*, 259 U.S. App. D.C. 369, 376, 815 F.2d 1570, 1577, cert. denied, 484 U.S. 976 (1987); see also *Emhart Industries, Inc.* v. *Duracell International, Inc.*, 665 F. Supp. 549, 570 n.40 (MD Tenn. 1987). Nor do OSHA standards supersede state common law and statutory obligations of employers to avoid "injuries, diseases, or death . . . arising out of" their operations. 29 U.S.C. § 653(b)(4). As the United States and the EEOC note in their *amici* brief (at 24 n.21), "OSHA's 1978 conclusions [are] not dispositive of the issues in this case."

Second, where an employer moves beyond a regulatory standard that it believes is based on outdated information and is inadequate to protect industrial safety, and does so in a way that implicates Title VII's values, an affected employee may challenge the employer in court. It makes no sense to argue that, simply because the employee has a cause of action involving complex scientific issues and the private litigation system may "yield disparate results," the challenged safety measure should *ipso facto* be invalidated. UAW Br. 42. As the Second Circuit has observed in an ADEA case, though "[i]t seems somewhat anomalous for the lawfulness of [safety measures] to depend on the particular evidence presented at various court trials throughout the country," that is the necessary consequence of the scheme Congress

[49]As shown above, it is ironic that the UAW relies so heavily upon OSHA's lead standard given that the standard specifically recognizes the propriety of gender-based protective and removal measures where necessary to guard fetal health—measures that the UAW's approach would render *per se* illegal. See *supra*, at 4-5, 22-23 & n.31.

has chosen, which obligates courts "to undertake [an] extensive inquiry" on a case-by-case basis into the safety risks involved and the feasible alternatives to employer practices. *Hahn* v. *Buffalo*, 770 F.2d 12, 15-16 (1985); see also *Western Air Lines, Inc.* v. *Criswell*, 472 U.S., at 411-412 ("diverse employment situations" require case-by-case analysis under BFOQ standard); *Johnson* v. *Mayor and City Council of Baltimore*, 472 U.S. 353, 361-362 (1985). Indeed, the complexity of the issues suggests, *not* a rule that the employee always prevails, but a standard according "substantial discretion" to employers who are striving to protect the health and safety of others. *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d, at 238.

D. A Fetal Protection Policy That Satisfies The Three-Part Inquiry Developed By The Lower Courts Is Lawful Under The BFOQ Standard

We believe the three-part analysis followed by the courts of appeals and set forth above on page 16 fully comports with the BFOQ standard outlined by this Court in *Criswell*. See also *EEOC 1990 Policy Guidance*, *supra* n.23, Pet. App. 138a-139a (the "pertinent questions" are the same "whether one applies the BFOQ or 'business necessity' analysis"). In particular, an employer cannot establish the absence of adequate but less discriminatory alternatives unless it can show that membership in the restricted class is a "legitimate proxy" for protecting against the fetal safety risks in question. *Criswell*, *supra*, at 414. This can be established by demonstrating *either* that (1) "all or substantially all" of the excluded group are likely to risk the health of offspring if they continue working in high-risk toxic areas, *or* that, as here, (2) it is "impossible or highly impractical" to assess the safety risks on an individualized basis, *i.e.* to determine " 'with sufficient reliability' " which members of the group will risk damage to offspring if they remain in high-risk positions. *Id.*, at 414-415; *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d, at 238 (quoting district court). Similarly, to establish the unavailability of alternatives the employer must show that "the substance or process

causing the claimed hazard is itself reasonably necessary to the normal operation of its business" and that "exposure to the claimed hazard is also reasonably necessary to the normal operation of its business." U.S. and EEOC *Amici* Br. 22.[50] Thus, contrary to the UAW's contention (Br. 24, 35-36 n.31), the BFOQ standard neither invites nor tolerates an "unreasonably dirty workplace."

Of course, an employer's subjective good faith beliefs—let alone "archaic or stereotypical notions"—are wholly insufficient to establish a BFOQ defense. The employer's policy instead must be grounded "on the best available scientific data." *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1190 n.27 (CA4 1982). Courts should evaluate that data with several considerations in mind. *First,* the BFOQ standard is not that of absolute necessity but rather *reasonable* necessity. It would be decidedly unreasonable, for example, to require an employer to *prove* that a given employee *will* conceive and then *will* deliver a brain-damaged child if not transferred to a safe work station. Such an impossible standard would not square with this Court's cautious approach to safety issues.[51]

[50]The United States and the EEOC in their *amici* brief (at 9-10, 21-22) propose a six-factor BFOQ analysis. Their additional factors are all subsumed in the adequate-but-less-discriminatory-alternatives analysis as followed by the courts of appeals and as specifically applied by the Seventh Circuit in this case. Although we believe the analytical framework formulated by the courts of appeals is the most appropriate one, there is thus no conflict between that framework and the one proposed by the United States and the EEOC.

[51]"The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case. The employer cannot be expected to establish the risk of [injury] 'to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.' " *Western Air Lines, Inc.* v. *Criswell,* 472 U.S., at 419-420 (citation omitted). For this reason, the courts of appeals have all agreed that proof to a certainty on risk issues is not required, but instead proof that " 'within the qualified scientific community . . . there is so considerable a body of opinion that significant risk exists . . . that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.' " Pet. App. 32a (quoting *Olin,* 697 F.2d, at 1191); see also *Hayes* v. *Shelby Memorial Hospital,* 726 F.2d, at 1548-1549.

Second, in grounding its policy on "the best available scientific data," the employer necessarily should be allowed to act on the basis of *present* medical knowledge and not be precluded from action on the basis of speculation about what future research may reveal. For example, where (as here) the evidence of male-mediated fetal harm at the blood lead levels in question "is, at best, speculative and unconvincing" (Pet. App. 34a), an employer must not be barred from responding to an "overwhelming" body of "convincing scientific evidence" demonstrating irreparable fetal brain damage from *in utero* exposure to equivalent maternal blood lead levels (*id.*, at 32a, 53a). As the Eleventh Circuit reasoned in *Hayes* v. *Shelby Memorial Hospital,*

> "[i]n those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women. *As additional research on men becomes available, however, the employer must adjust its policy or risk running afoul of Title VII.*" 726 F.2d 1543, 1549 (1984) (emphasis added).[52]

Finally, notwithstanding the properly rigorous nature of the BFOQ inquiry, courts should be hesitant when evaluating suggested alternatives "in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Watson* v. *Fort Worth*

[52]Thus the UAW is wrong in suggesting that a BFOQ analysis frees the employer from responding to new scientific information and developments in technology. UAW Br. 25. The Court of Appeals emphasized these continuing employer obligations in its opinion below. See Pet. App. 36a, 59a n.43.

The evidence in this case, of course, goes well beyond the *Hayes* standard quoted above. Here there was not simply a *lack* of evidence regarding male mediation at the blood lead levels in issue. Rather, as the Court of Appeals emphasized, Johnson Controls submitted extensive expert evidence that, "without exception," established that these levels "did not pose a substantial risk of genetically transmitted harm from the male to the unborn child." Pet. App. 33a; see also n.8, *supra* (citing evidence).

Bank & Trust, 487 U.S. 977, 998 (1988) (plurality opinion). The appropriate inquiry is whether the employer has " 'reasonable cause to believe, that is, a factual basis for believing,' " that potential alternatives would be inadequate. *Dothard* v. *Rawlinson,* 433 U.S., at 333 (quoting *Weeks* v. *Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228, 235 (CA5 1969)); see also *Western Air Lines, Inc.* v. *Criswell,* 472 U.S., at 422-423 (inquiry is whether employer has "a substantial basis for believing" that alternatives will not "insure" its appropriate goals).

Thus some deference is due an employer's business judgment, especially where the employer has already attempted alternatives to its policy and found them inadequate. This Court has emphasized that, because " '[c]ourts are generally less competent than employers to restructure business practices,' . . . the judiciary should proceed with care before mandating that an employer must adopt a [suggested alternative] in response to a Title VII suit." *Wards Cove Packing Co.* v. *Atonio,* 109 S. Ct. 2115, 2127 (1989) (quoting *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 578 (1978)). This caution is equally applicable to the BFOQ inquiry and should be at its zenith where the issue is safety—a matter "of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb." *Usery* v. *Tamiami Trail Tours, Inc.,* 531 F.2d, at 238.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED

The UAW devotes virtually its entire brief to arguing that gender-drawn fetal protection measures are *per se* unlawful under Title VII, reserving only a few paragraphs at the end to argue that the judgment below should in any event be reversed. See UAW Br. 45-48. This focus is understandable. The choice of analytical framework and the allocation of proof burdens clearly were irrelevant to the outcome: the Court of Appeals emphasized that under *either* a BFOQ *or* a business necessity analysis, and *regardless* of which party bore the ultimate burden of persuasion, Johnson Controls was entitled to summary judgment. Moreover, the UAW specifically conceded in seeking this Court's review that "we do *not* argue . . . that if the court below is right on the law, the affirmance of summary judgment is wrong because there are contested factual issues." Pet. Cert. Reply Br. 6-7 n.4 (emphasis added).[53]

Instead, the UAW's abbreviated argument is that the Court of Appeals failed altogether to consider certain matters properly in issue and thus should be reversed. Its objections are not well-founded.[54]

Male mediation of harm. The UAW asserts that the Court of Appeals failed to consider the "male-mediation issue" with the burden of proof placed upon Johnson Controls. UAW Br. 46 & n.40. This is the *only* ground advanced by the United States and

[53]The UAW's certiorari papers nowhere even mention Fed. R. Civ. P. 56 or this Court's Rule 56 precedents. Particularly in light of the concession quoted above, it cannot be argued that the propriety of summary judgment under Rule 56 is "fairly included" in any of the questions set forth in the petition. See this Court's Rule 14.1(a). That issue is thus not before the Court for consideration. *Ibid.*

[54]Although the UAW in its brief (at 5 n.5, 21) now attempts to minimize the evidence of fetal risk, it conceded below that "the first element—the substantial risk of harm to the fetus—*has been established.*" UAW Seventh Circuit Br. 33 (emphasis added).

In addition to the points discussed in text, the UAW argues that "adult human beings and their live children" may be at risk at comparable blood lead levels. UAW Br. 46. This argument ignores the undisputed evidence that Johnson Controls already has in place an extensive health monitoring program to protect its employees from adverse lead effects *at any level;* when ill effects are detected, corrective actions, including removal when necessary, are taken *regardless* of specific blood lead levels. Those measures cannot be taken with the unborn. *See supra,* at 7 (discussing evidence). Moreover, *precisely* because children at home are at risk from employee lead exposure, Johnson Controls enforces elaborate safety and hygiene measures "to keep all the lead that an employee may contact in the plant in the plant, not to allow it to go home." Beaudoin Test., JA 87; see also Fishburn Test., JA 163. The UAW has never disputed that these stringent practices effectively protect child health.

the EEOC in their *amici* brief (at 24-26) as a basis for reversal. This contention is unwarranted.

As the Court of Appeals noted, the Rule 56 inquiry was whether " 'a rational trier of fact [could] find for the non-moving party' " on this issue. Pet. App. 31a (quoting *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The court found in the business-necessity portion of its opinion that there is "overwhelming medical and scientific research data demonstrating a substantial risk to the unborn child" from the maternal blood lead levels in issue but that, in contrast, the evidence of comparable male-mediated risk "is, *at best*, speculative and unconvincing"; "[t]he facts the UAW posits do not negate" the evidence that Johnson Controls had presented demonstrating that, at these levels, "the ris' ` transmission of harm to unborn children is confined to fert' ,emale employees." Pet. App. 32a, 34a-36a (emphasis added). Thus a "reasonable factfinder" could not "reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead." *Id.*, at 34a. Given the court's conclusion that a rational trier of fact could not find male mediation at these levels in light of the "speculative" and "unconvincing" nature of the UAW's evidence, the allocation of ultimate proof burdens was *immaterial* to the outcome because a factfinder can *never* base its decision upon such evidence.[55]

Lest there was any doubt on this matter, the Court of Appeals emphasized in the BFOQ portion of its opinion—with the ultimate proof burden allocated to Johnson Controls—that lead at these levels "has been scientifically established to pose very serious dangers to young children *and, in particular, to the offspring of female employees,*" and that Johnson Controls had demon-

[55]See generally 6 *Moore's Federal Practice* ¶ 56.15[3], at 56-275 to 56-276 & n.55 (1988); 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2727, at 165-169 (1983); see also *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968) (absence of "significant probative evidence" requires summary judgment).

strated that there was no way to protect "the health of the unborn" *other* than through "the exclusion of fertile women from high lead exposure positions." Pet. App. 48a, 58a (emphasis added); see also *id.*, at 51a ("intellectual and physical development" of unborn at risk through female exposure at these levels), 53a ("substantial and irreversible risk" at issue is caused by "lead exposure in the womb"). The argument for a remand on this point ultimately reduces to the proposition that the Court of Appeals committed reversible error in not also reciting in its BFOQ section that "we meant it when we said the male-mediation evidence is speculative and unconvincing and that a reasonable factfinder could not conclude otherwise." That is simply an invitation to ask the court to reiterate what it clearly and adequately already has concluded.[56]

Animal-studies evidence. The UAW's petition for certiorari alleged that the Court of Appeals had "held, as a matter of law," that "animal studies can *never* constitute substantial evidence of risk to humans," going so far as to present this as a separate question for review. Pet. Cert. 15, 26 (emphasis added). It now confines the issue to a single footnote in its brief (at 46-47 n.40).

[56]Though the UAW asserts in passing that it believes there was "a substantial factual question" on the male-mediation issue, *that* Rule 56 question is not before the Court. See *supra*, at 41 & n.53. In any event, the evidence cited by the UAW and the United States creates no such question: (a) Contrary the UAW (Br. 46), OSHA did *not* conclude there is male-mediated fetal injury *at the blood lead levels in issue*, as opposed to an increased risk of temporary reduction in male fertility. See *supra*, at 5-7 & n.7. (b) Contrary to the United States (*Amici* Br. 24-25 n.23), Dr. Silverstein's literature review did not (by his own admission) reveal male-transmitted fetal harms *at these levels*. See n.9, *supra*. (c) Also contrary to the United States (n.23), Dr. Legator, far from supporting the UAW position on this issue, agreed that whereas fetal harm from *in utero* exposure *at these levels* is "well-documented and known," the possibility of comparable male-mediated harm is "an unknown." JA 257.

Properly quoted,[57] and placed in the context of the surrounding analysis, the Court of Appeals' discussion does not even remotely suggest a "categorical disqualification of animal studies," Pet. Cert. 27, but instead an analysis of the *particular* animal studies tendered and a rejection of any extrapolation to humans from those *particular* studies as "speculative and unconvincing," Pet. App. 34a. *Of course* animal studies can constitute an important predictive tool in appropriate cases, but "[t]he validity of extrapolation to humans from data derived from tests on animals" depends upon the particular facts of each case. *Environmental Defense Fund, Inc.* v. *EPA*, 167 U.S. App. D.C. 71, 78, 510 F.2d 1292, 1299 (1975).

Here there was substantial expert evidence that "[s]tudies of the effect on the offspring of lead exposed male rats cannot be readily extrapolated to the human male, particularly as to the dose necessary to cause reproductive effects."[58] The Court of Appeals accepted this expert evidence, emphasized the significant "differences between the effect of lead on the human and animal reproductive systems," and concluded that "[t]he UAW's animal research evidence does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion" that any male-mediated risks were at all comparable to the risks from *in utero* exposure to the blood lead levels in issue. Pet. App. 34a & n.29 (citing evidence). UAW experts *themselves* agreed that the evidence in this respect was entirely speculative.[59]

[57]As noted in our brief in opposition (at 22-23), the UAW misquoted the Court of Appeals' language in its petition for certiorari.

[58]Hammond Aff. ¶ 7, JA 73; see also Scialli Aff. ¶ 9, JA 181 (rodent studies in this area "cannot be extrapolated to humans" because "[t]he reproductive system of the rodent, in terms of transmissible changes in offspring due to exposure to toxic substances, is simply not analogous to the human reproductive system, male or female"); Chisolm Dep., JA 172-173, 176-177. Dr. Scialli offered as "[a] specific example . . . the drug Thalidomide which was used in the 1960's to treat pregnant women. This drug was given to mice and rats and did not cause any birth defects; however, the drug caused major limb defects in human offspring." Scialli Aff. ¶ 9, JA 181.

Adequate but less restrictive alternatives. Finally, the UAW criticizes the Court of Appeals for not having considered in greater detail a number of alternatives that the UAW now suggests might be adequate to protect fetal health and safety assuming, as the UAW does not, that this is a lawful motive under Title VII. UAW Br. 47-48. The UAW has failed to preserve this argument.

Johnson Controls demonstrated below that it had adopted its policy in response to the specific urgings of its medical consultants and the recommendations of the Centers for Disease Control. JA 94, 153, 183-184. Limiting the policy to women who actually *are* pregnant would not prevent fetal lead poisoning; because lead is an accumulative toxicant, a fetus would be at risk from maternal lead exposure that occurred long before conception. See *supra*, at 3-4 & n.4. Moreover, it would be " 'impossible or highly impractical' " for Johnson Controls to restrict its policy to those who actually *will* become pregnant. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S., at 414 (citation omitted). Such a policy would not account for the reality of unplanned pregnancies; it would invite highly intrusive inquiries that would not protect against the risks involved;[60] and the company for five years had

[59]See, *e.g.*, Legator Dep., JA 257 ("certainly" agreeing that, whereas risks of *in utero* exposure "are well-documented and known," male-mediated risks are "an unknown in terms of the precise levels"); Brix Dep., JA 265 (animal studies suggest "an impact on the male reproductive tract . . . as low as perhaps say 40 to 50 blood lead. . . . [B]ut I cannot say that that's really the case in humans because we do not have good data in male patients, male subjects at those kinds of levels. So I'm hesitant to make a statement one way or the other. *We don't know*") (emphasis added). See also *supra*, at 5-7.

[60]In order to attempt to determine which employees will become pregnant, Johnson Controls would need continually to question them about—if not try to monitor—their birth control practices, sexual orientation and activities, and similar intimate matters. Putting aside the offensive nature of these measures, an employer obviously could not reliably police its employees' sexual behavior in this manner.

attempted a voluntary program (coupled with individualized employee counseling) but had continued to see "a substantial number of pregnancies" involving dangerously high maternal blood lead levels. Beaudoin Dep., JA 94; see *supra,* at 8-9.[61] The company also documented its careful consideration of other potential alternatives—including the elimination of lead from its operations altogether, whether additional technological safeguards could be used to reduce general lead levels even further, the use of other criteria for determining which specific jobs were likely to create unacceptable fetal health risks, further reliance upon respirators, and greater individualized testing—and explained why such potential alternatives were inadequate.[62]

The UAW simply ignored this entire issue on appeal and, in its words, "did not respond" to Johnson Controls' evidence. UAW Seventh Cir. Br. 36-37 n.14. Instead, it advised the Court of Appeals that, while the question of alternatives "*would ordinarily be at issue in a case of this type,*" it was *not* putting that question "at issue" in *this* case. *Ibid.* (emphasis added). As the Seventh Circuit emphasized, "[t]he UAW, in its briefs and argument, has failed to present even one specific alternative to Johnson's fetal protection policy." Pet. App. 40a. The court specifically held that the UAW had waived the issue of adequate-but-less-discriminatory alternatives pursuant to Fed. R. App. P. 28(a)(4) and found, in the absence of any evidence to the contrary and since the matter was not at issue, that Johnson Controls had shown the reasonable necessity of its policy. Pet. App. 36a-38a, 53a-54a, 58a-59a.

[61]See also Beaudoin Aff. ¶ 17, JA 78; JA 85; Beaudoin Test., JA 95, 99-100; Fishburn Test., JA 153-154, 156; Scialli Aff. ¶¶ 11-12, JA 181-182; Whorton Aff. Ex. C, JA 192-193; Chisolm Aff. ¶¶ 9-11, JA 200-201; Pet. App. 40a-41a, 53a.

[62]See, *e.g.,* Beaudoin Aff. ¶ 17, JA 78; Beaudoin Test., JA 97-101, 103; Beaudoin Test. 129-130, 132-138, attached to Jaspan Aff. (R.38); Fishburn Test., JA 153-154. See also JA 17 ("it is apparent that the company is doing all that it can to reduce lead exposure levels to safe levels"); Pet. App. 40a-41a, 54a, 58a.

The UAW describes its waiver of the alternatives question as a "litigation decision," without explaining why *that* should now excuse its earlier choice not to put the question "at issue" in this case. Pet. Cert. Reply Br. 7. Its argument that its "declination" to contest the point should now be ignored because the matter involved a "far-down-the-line question" of "the most minimal significance," and its suggestion that it somehow was caught off guard by the Court of Appeals' consideration of the availability of the BFOQ defense, are baseless.[63]

Title VII cases are, of course, subject to the same rules of procedure and practice as other areas of civil litigation. *United States Postal Service Board of Governors* v. *Aikens,* 460 U.S. 711, 716 (1983). One of those rules is that a party may not ignore an issue—let alone *expressly* waive it—and then turn around and

[63]The UAW represents that it decided not to put the alternatives question "at issue" because "the district court had held that a fetal protection purpose can *not* constitute a bfoq." Pet. Cert. Reply Br. 7 (emphasis in original). The District Court "held" no such thing, noting instead that it did not have to reach the issue. JA 17 n.5. Moreover, Johnson Controls had argued from the outset of the case that its policy passed muster under the BFOQ standard. See, *e.g.,* Answer ¶87, JA 53; Johnson Controls' Seventh Cir. Br. 14-20. As noted above (*supra,* at 16), the alternatives question is centrally important under both a business necessity and a BFOQ analysis. Instead of a "far-down-the-line question" of "the most minimal significance," Pet. Cert. Reply Br. 7, the lack of adequate alternatives was pivotal to the District Court's judgment. JA 17-18, 20. The UAW had an immediate obligation under Fed. R. App. P. 28 to contest this matter if it so desired, but instead decided not to and advised the Court of Appeals that adequate alternatives were not "at issue."

Perhaps the UAW's "litigation decision" grew out of its apparent general belief—which it candidly expressed to the Seventh Circuit—that "it is not usually considered good tactics to expose your case prematurely" before trial. UAW Seventh Cir. Br. 38 (*re* UAW's failure to take more discovery at the deposition stage in preparing to resist summary judgment motion). This conception is fundamentally at odds with a party's litigation obligations. See, *e.g., Celotex Corp.* v. *Catrett,* 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole").

criticize the court for not having resolved the (non)issue in its favor.

> "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that the appellant's brief contain 'the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.' Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of our institution. . . . [W]here counsel has made no attempt to address the issue, we will not remedy the defect . . . ." *Carducci* v. *Regan,* 230 U.S. App. D.C. 80, 86, 714 F.2d 171, 177 (1983) (citation omitted).

This view is squarely in accord with this Court's practice of not allowing a petitioner to advance arguments that it chose not to raise at the court of appeals stage. See, *e.g., EEOC* v. *Federal Labor Relations Authority,* 476 U.S. 19, 24 (1986) (dismissing writ of certiorari as improvidently granted); *G.D. Searle & Co.* v. *Cohn,* 455 U.S. 404, 412 n.7 (1982) ("Because petitioner did not present this argument to the Court of Appeals, we do not address it"); *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 362 (1981). That practice is particularly appropriate where, as here, the Court of Appeals found the issue was waived and the petitioner has not sought review of that determination.[64] Moreover, even if the factual issue of the feasibility of potential alternatives had not been waived below, it is not fairly included in the questions presented—to the contrary, the UAW specifically advised in its certiorari papers that it was *not* advancing the argument that "the affirmance of summary judgment is wrong because there are contested factual issues." Pet. Cert. Reply Br. 6-7 n.4.

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[64]Because Johnson Controls brought these matters to the Court's attention in its brief in opposition to certiorari (at 12, 19-21), there is "no reason to depart" from the Court's "normal practice" discussed above. *EEOC* v. *Federal Labor Relations Authority, supra,* at 24.

CONCLUSION

For all of the foregoing reasons, the respondent Johnson Controls, Inc. respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

*STANLEY S. JASPAN
SUSAN R. MAISA
ANITA M. SORENSEN
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JOHN P. KENNEDY
Vice President, Secretary,
and General Counsel
JOHNSON CONTROLS, INC.
5757 North Green Bay Ave.
Milwaukee, Wisconsin 53209

CHARLES G. CURTIS, JR.
FOLEY & LARDNER
One South Pinckney Street
Madison, Wisconsin 53701
(608) 257-5035

*Counsel of Record

Attorneys for Respondent

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